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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE IRMA E. GONZALEZ)

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL LOMA-TORRES, Defendant.	CASE NO. 08CR0538-IEG DATE: September 12, 2008 TIME: 10:00 a.m. STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS

I.

BACKGROUND[1]

Mr. Loma-Torres incorporates his earlier statement of facts from his last set of motions.

II.

MOTIONS TO SUPPRESS EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT

Mr. Loma-Torres was stopped and arrested by the police in violation of the Fourth Amendment. The police lacked reasonable suspicion to first "stop" Mr. Loma-Torres and never obtained the probable cause necessary to execute his warrantless arrest. Mr. Loma-Torres's arrest is presumptively unreasonable as the

[1] The following statement of facts and any facts further cited in this motion are based on discovery provided by the government. Mr. Loma-Torres does not admit the truth or accuracy of these facts, and reserves the right to challenge the truth and accuracy of these facts in any subsequent pleadings or during any further proceedings.

government has not proven that it was supported by probable cause. This court should suppress all evidence (including statements and evidence seized) arising from the illegal stop and arrest and search.

A. There Was No Reasonable Suspicion to Stop Mr. Loma-Torres

Mr. Loma-Torres was stopped while walking with a companion along the side of a paved road in a rural area outside Brawley, California. At that time, a police officer in a marked patrol car stopped Mr. Loma-Torres and his companion and conducted a patdown search for weapons, finding nothing. The police officer also questioned Mr. Loma-Torres in Spanish, asking him his name and where he was going. Mr. Loma-Torres provided his name and stated that he was walking to the town of Niland. At that time, the police officer placed Mr. Loma-Torres and his companion in the back of the patrol car, closed the car door, and radioed for assistance from border patrol. At no point during this encounter did the police officer ask Mr. Loma-Torres any questions regarding his nationality or immigration status. At this point, there was no reasonable suspicion that Mr. Loma-Torres was engaging in criminal activity. The police officer nevertheless detained Mr. Loma-Torres in his patrol car and radioed his request for uniformed border patrol agents to arrive at the scene.

Temporary detention of individuals by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" within the meaning of the Fourth Amendment, and must be supported by at least reasonable suspicion. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976). A stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. *See Terry v. Ohio*, 392 U.S. 1 (1968). This is true in the context of roving border patrol stops, similar to the one executed here. *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving border patrol agents must have reasonable suspicion, based on specific and articulable facts, in order to initiate a stop).

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). In the context of investigatory stops, "the Fourth AMendment is satisfied if the oficer's action is supported by reasonable suspicion to believe that criminal activity may be afoot..." *Id.* (internal quotations omitted). To sustain an officer's reasonable suspicion determination, this Court "must look at the 'totality of the circumstances' ... to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* Although an officer may rely upon "experience and specialized training to make inferences from and deductions about the cumulative information available" to him before he makes an investigatory stop, "an officer's reliance on a mere hunch is insufficient to justify [such] a stop..." *Id.* at 273-74 (internal quotations omitted).

Here, the totality of the circumstances fall far short of the reasonable suspicion standard. The *Arvizu* case demonstrates how a Border Patrol agent properly formed reasonable suspicion to perform an investigatory vehicle stop. 534 U.S. at 277. In that case, the agent articulated the following facts:

1. A magnetic sensor alerted the agent to the presence of a vehicle on an unpaved, seldom traveled road used by smugglers to avoid Border Patrol checkpoints. *Arvizu*, 534 U.S. at 288.
2. The sensor alert occurred during a change in shifts which would leave the area unpatrolled by the agents. *Id.*
3. The same sensor had detected a minivan using the same route several weeks before which resulted in a marijuana seizure. *Id.* at 269-70.
4. A second sensor signal indicated to the agent that the vehicle had turned onto another unpaved road on a route commonly used to circumvent checkpoints. *Id.* at 270.
5. When the agent intercepted the vehicle, it turned out to be a minivan. *Id.* at 270.
6. When the agent followed the minivan, he noted that the occupants, who appeared to be a family, behaved strangely, first ignoring him and then waving in a mechanical manner. *Id.* at 270-71.
7. The agent could see the children's knees, which indicated that their feet rested on some cargo. *Id.* at 270.
8. The van turned onto a third, even rougher unpaved road, away from any checkpoint, and away from any destination a family might want to reach for recreation. *Id.* at 271.
9. A radio check by the agent indicated that the minivan was registered to an address four miles from the international border in a neighborhood notorious for smuggling activity. *Id.* at 271.

Thus, the agent in *Arvizu* had nine *independent*, *particularized*, and *objective* facts that gave them particular suspicion *of the individuals in the vehicle*. As a result, the agent had reasonable suspicion to perform an investigatory stop of the minivan because he could "infer from his observations, his registration check, and his experience that... [the minivan] had set out ... along a little-traveled route used by smugglers to avoid the ... checkpoint[s] ... at a time when officers would be leaving their ... shifts ... on unpaved and primitive roads. *Id.* at 277.

Here, in contrast, the government can muster no independent, objective fact that provides particularized suspicion of Mr. Loma-Torres. The facts indicated that he was stopped on a police officer's hunch that Mr. Loma-Torres was illegally present in the United States. Then, when the police officer approached Mr. Loma-Torres, he cooperated and provided his name and destination. The police officer specifically avoided the opportunity to ask Mr. Loma-Torres any questions about his immigration status. Instead, the police officer assumed that Mr. Loma-Torres was in the U.S. illegally and asked for assistance from border patrol.

The police officer's stop of Mr. Loma-Torres is not supported by a particularized and objective basis for suspecting him of criminal activity. As no reasonable suspicion exists for the stop, the resulting evidence must be suppressed under the Fourth Amendment. In the alternative, the Court should hold an evidentiary hearing at which Mr. Loma-Torres can challenge the sufficiency of the government's showing as to reasonable suspicion.

B. There Was No Probable Cause to Arrest Mr. Loma-Torres

Discovery in this case also indicates that Mr. Loma-Torres was in police custody at the time that assistance from border patrol arrived. When an arrest is effectuated without a warrant, as in this case, it must be supported by probable cause. *United States v. Del Vizo*, 918 F.2d 821 (9th Cir. 1990). Probable cause exists when an officer has "reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1296 (9th Cir. 1988) (citations omitted).

As discussed above, the facts at this point indicate that, at the time Mr. Loma-Torres was taken into police custody, the police officer did not know his nationality nor did he have any information about his immigration status in the United States. Mr. Loma-Torres had answered the officer's questions and provided his name and destination. The police officer had merely a hunch that Mr. Loma-Torres was present illegally in the United States. Nevertheless, the police officer decided to act on his hunch by detaining Mr. Loma-Torres in a patrol car and by calling for assistance from border patrol. It was only after a border patrol agent arrived that the government claims that Mr. Loma-Torres was asked about his immigration status. At this point, even before the question was asked, Mr. Loma-Torres had been detained, as he was not free to leave, and an arrest had been effectuated.

Because Mr. Loma-Torres was arrested without probable cause, the evidence resulting from his arrest must be suppressed. In the alternative, the Court should hold an evidentiary hearing at which Mr. Loma-Torres can challenge the sufficiency of the government's showing as to probable cause.

III.

MOTION TO SUPPRESS STATEMENTS

Mr. Loma-Torres provides this additional briefing in support of his motion to suppress statements on grounds of involuntariness.

When a statement is given by an accused within six hours of arrest, 18 U.S.C. § 3501(c) states that the statement "shall not be inadmissible solely because of delay." *United States v. Mendoza*, 157 F.3d 730, 731 (9th Cir. 1998) ("18 U.S.C. § 3501(c) provides a six-hour 'safe harbor' after an arrest and before the arraignment during which a confession will not be excludable solely because of delay"); *United States v. Van Poyck*, 77 F.3d 285, 288 (9th Cir. 1996). "A confession made after the safe harbor period may be excluded solely because of the delay." *Mendoza*, 157 F.3d at 731. This six-hour period may be extended only if the delay is "reasonable" or public policy concerns weigh in favor admission. *Id*. (citing *Van Poyck*, 77 F.3d at 288; *United States v. Wilson*, 838 F.2d 1081, 1084 (9th Cir. 1988)). The public policy concerns to be considered include "discouraging officers from unnecessarily delaying arraignments, preventing the admission of involuntary confessions, and encouraging early processing of defendants." *Mendoza*, 157 F.3d at 731-31.

Here, there was more than a six-hour delay between Mr. Loma-Torres's arrest and his subsequent interrogation. Mr. Loma-Torres was arrested on the morning of January 27. According to the government's discovery, his videotaped interrogation occurred after 2 a.m. in the early morning of January 28. Because the interrogation occurred well beyond the six-hour "safe harbor" permitted under 18 U.S.C. § 3501(c), an evidentiary hearing is necessary to determine whether the delay was reasonable.

IV.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

As more information comes to light, due to the government providing discovery in response to these motions, or an order of this Court, the defense may find it necessary to file further motions, or to supplement existing motions with additional facts. The denial of this request will result in a violation, at a minimum, of Mr. Loma-Torres's Fifth and Sixth Amendment rights. Therefore, defense counsel requests the opportunity to file further motions and supplementary briefing based upon information gained from discovery.

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V.

CONCLUSION

For the foregoing reasons, Mr. Loma-Torres respectfully requests that the Court grant the above motions.

Respectfully submitted,

DATED: August 29, 2008

/s/ *Jennifer L. Coon*
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Attorneys for Mr. Loma-Torres

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of information and belief, and that a copy of the foregoing document has been caused to be delivered this day upon:

Courtesy Copy Court

Assistant United States Attorney via ECF

Dated: August 29, 2008

/s/ Jennifer L. Coon

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